

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PHILIP C. DUROCHER

Appeal No. 98-2120
Application No. 08/607,915¹

ON BRIEF

Before MEISTER, ABRAMS and NASE, ***Administrative Patent Judges.***

MEISTER, ***Administrative Patent Judge.***

DECISION ON APPEAL

Philip C. Durocher (the appellant) appeals from the final rejection of claims 5-11, the only claims remaining in the application.²

¹ Application for patent filed February 28, 1996.

² Claim 9 has been amended subsequent to final rejection by an amendment filed July 14, 1997 (Paper No. 7), which amendment was deemed by the examiner to overcome the final
(continued...)

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We REVERSE.

The appellant's invention pertains to a package for a stick product such as deodorant. Of particular importance is the provision of a locking mechanism for maintaining the position of the stick product at given position relative to the package. Independent claim 5 is further illustrative of the appealed subject matter and a copy thereof can be found in the APPENDIX to the brief.³

The references relied on by the examiner are:

Houlihan 1937	2,071,747	Feb. 23,
Keith 1956	2,770,358	Nov. 13,
European patent (Fierus)	0 442 004	Aug.
21, 1991		

²(...continued)
rejection of this claim under 35 U.S.C. § 112, second
paragraph (see the advisory action dated August 19, 1997
(Paper No. 9)).

³ We base our understanding of the appealed subject matter upon the following interpretation of the terminology appearing in the claims. In line 3 of claim 5 (as it appears in the APPENDIX to the brief) we interpret "through" to be -
- in -- since it is readily apparent from a perusal of this claim that the recited "slot" includes both groove 46 (which does not extend through the wall) and slot 34 (which does extend through the wall).

Claims 5-11 stand rejected under 35 U.S.C. § 103 as being unpatentable over Keith in view of Fierus and Houlihan. The examiner is of the opinion that it would have been obvious to provide the device of Keith with a locking mechanism of the type disclosed by Fierus. Additionally, the answer states that:

The motivation is provided by Houlihan's lock #30. Houlihan also discloses the equivalence of lipstick and deodorant. [Page 3.]

We will not support the examiner's position. Keith discloses two embodiments of a cylindrical lipstick dispenser that is refillable. In the embodiment of Figs. 1-3, the bottom of the cylinder or barrel that forms the enclosure of the dispenser has a removable sealing cap 3 which allows a lipstick 7 and a holder 8 to be inserted into the bottom of the cylinder or barrel. The wall of the cylinder or barrel is provided with an elongated slot 4 having a plurality of detent notches 13 spaced along one side thereof. The holder 8 comprises a split expansion ring that contracts around and grips the end of the lipstick and has protruding ears 9,10, with the ear 9 having a holding member 14 formed thereon. When the lipstick 7 and the holder 8 are inserted into the

cylinder or barrel, the ears 9,10 project through the slot 4 in such a manner that the holding member 14 snaps into the notches, thus locking the holder and lipstick in a desired position. If the ends of the projecting ears are squeezed together by the fingers of a user, the holding member is released from the notch in which it was engaged and the lipstick and holder may be repositioned by sliding the ears along the slot so that an end of the lipstick may be extended from and retracted into the cylinder or barrel as desired. Upon the removal of the fingers of a user, the holding member snaps into an adjacent notch and the holder and lipstick are once again locked in position.

The embodiment of Figs. 6 and 7 shows a similar arrangement except that the holder is in the form of a cupped container that has a projecting detent spring 51 which cooperates with squared recesses 48 that are spaced along one side of an open slot in the wall of the cylinder or barrel. The projecting detent spring snaps into the squared recesses (in a manner similar to the holding member 14 snapping into the detent notches 13 in the embodiment of Figs. 1-3), thus locking the cupped container together with the lipstick in a

fixed position. The lipstick and cupped container may be repositioned with respect to the cylinder or barrel by gripping the projecting detent spring and sliding it, together with the cupped container and lipstick, along the slot in essentially the same manner as in the embodiment of Figs. 1-3.

Thus, both embodiments of Keith can be considered to have a barrel with a slot, a product support member, an adjustment button and a locking mechanism. Neither of these embodiments, however, shows a plurality of detents laterally disposed along each side of the slot or a locking mechanism with an adjustment button having mounted thereon at least two resilient arms with detents adjacent the ends of the arms as set forth in independent claim 5.

In an attempt to overcome these deficiencies, the examiner relies on the teachings of Fierus. Fierus, at the broadest level, teaches a barrel-like enclosure 1 for an elongated article wherein the enclosure is provided with (1) a slot having a plurality of detents 6 along each side thereof, (2) an adjustment button 4 and (3) a locking mechanism of the type having resilient arms with detents 8 on the ends thereof

that cooperate with the detents 6 along the sides of the slot. While Fierus provides these elements for the purpose of repositioning the elongated article M so that an end thereof may be extended from and retracted into the enclosure, Fierus does so in a completely disparate context, namely, wherein the elongated article M is a knife blade.

In our view, there is no suggestion to combine the disparate teachings of Fierus with those of Keith in the manner proposed by the examiner. In the first place, the lipstick dispenser of Keith, as we have noted above, already has a locking mechanism and there appears to be neither reason nor need to modify Keith's locking structure. In the second place, in addition to the elements mentioned above, Keith's locking structure also includes a toggle 5, and an arresting part or cam 14 and a handle 13, all of which are necessary in order to deflect the resilient arms to a position where the detents 8 formed thereon are engaged with the detents 6 along the edges of the slot. The resulting locking structure is bulky and appears to be ill-suited for use in a lipstick dispenser such as that of Keith. The examiner may not pick and chose from any one reference only so much of it as will

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support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art (**Bausch & Lomb, Inc., v. Barnes-Hind/Hydrocurve Inc.**, 796 F.2d 443, 448, 230 USPQ 416, 419 (Fed. Cir. 1986), **cert. denied**, 484 U.S. 823 (1987) and **In re Kamm**, 452 F.2d 1052, 1057, 172 USPQ 298, 301-02 (CCPA 1972)), and obviousness cannot be established by locating references which describe various aspects of appellants' invention without also providing evidence of the motivating force which would impel one skilled in the art to do what the appellants have done (**Ex parte Levengood**, 28 USPQ2d 1300, 1302 (Bd. Pat. App. & Int. 1993)). Here, we find no persuasive evidence of such a motivating force. While the examiner states that "Houlihan's lock #30" provides motivation, the examiner provides no explanation whatsoever as to why Houlihan's lock 30 provides motivation to combine the disparate teachings of Keith and Fierus, and we are at a total loss to understand why this might be the case. The examiner's reference to Houlihan establishing the "equivalence of lipstick and deodorant," at the most appears to have relevance

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to dependent claims 10 and 11, and even if we were to agree with the examiner that Houlihan establishes such an equivalence, the basic deficiencies of the relied on prior art that we have noted above would not be overcome.

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In view of the foregoing, the decision of the examiner to reject claims 5-11 under 35 U.S.C. § 103 based on the combined teachings of Keith, Fierus and Houlihan is reversed.

REVERSED

JAMES M. MEISTER)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
NEAL E. ABRAMS)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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JEFFREY V. NASE)	
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